87-575

Supreme Court, U.S.
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

HAROLD A. MORSE, Petitioner

v.

THE DAILY PRESS, INC., Respondent

RICHMOND SULLIVAN, Petitioner

v.

THE DAILY PRESS, INC., Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

I. WHETHER CONSIDERATION OF ISSUES OF EQUITABLE TOLLING AND EQUITABLE ESTOPPEL, WHICH COULD MODIFY THE TIME LIMITATIONS IN THE AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA), MAY BE PROPERLY DISPOSED OF BY A SUMMARY JUDGMENT WITHOUT A FULL EVIDENTIARY HEARING, AND AS TO WHICH THERE IS CONFLICT AMONG THE COURTS OF APPEALS.

II. WHETHER AN EMPLOYEE SHOULD BE BARRED FROM ANY EQUITABLE MODIFICATION OF THE ADEA TIMING REQUIREMENTS BECAUSE HE HAS CONSULTED AN ATTORNEY DURING THE PERTINENT PERIODS FOR REASONS UNRELATED TO ANY AGE DISCRIMINATION CLAIM, AND AS TO WHICH THERE IS CONFLICT AMONG THE COURTS OF APPEALS.

LIST OF PARTIES

The parties to the proceedings below were the petitioners, Harold A. Morse and Richmond Sullivan, who were the individual plaintiffs in the consolidated cases below against the respondent, The Daily Press, Inc.

The Daily Press, Inc. is a wholly-owned subsidiary of The Tribune Company, Chicago, Illinois.

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I. The Fourth Circuit's approval of a summary judgment without a full evidentiary hearing to decide allegations of equitable tolling and equitable estoppel of ADEA timing requirements (A) procedurally conflicts with decisions in other Circuits dealing with similar issues and directly conflicts with a decision of the 10th Circuit with a similar fact situation; and (B) is based on plain error with regard to its resolution of the notice issue.....	11

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II. The Fourth Circuit's imposition of an automatic bar to any equitable relief for an employee who has consulted an attorney during the pertinent time periods of the ADEA, regardless of the fact that such consultations were unrelated to any age discrimination claim but were directly related to the employer's conduct, is (A) in conflict with some of the other Circuits; and (B) it impliedly supports the position that any attorney consulted by a person within the protected class under the ADEA for any reason during the pertinent time periods, may be held liable if he fails to recognize a possible age discrimination claim even when there is misleading conduct on the part of the employer..... 21

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OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is presently reported at 823 F.2d 548 as a decision without a published opinion, but it is to be published. It is reprinted in the appendix hereto, p. 1a, infra.

The memorandum order of the United States District Court for the Eastern District of Virginia, Newport News Division, (MacKenzie, D.J.), dated July 17, 1986, has not been reported. It is reprinted in the appendix hereto, p.11a, infra. The Order and Opinion of the same court, entered September 6, 1985, has not been reported. It is reprinted in the appendix hereto, p.24a, infra.

JURISDICTION

Invoking federal jurisdiction under the provisions of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. Section 621 et seq., the petitioners brought these suits in the Eastern District of Virginia on July 1, 1985. On September 16, 1985, the Eastern District Court consolidated the two cases, denied the respondent's motion to dismiss, and granted the petitioners' motion to amend their complaints. On July 17, 1986, the same court granted the respondent's motion for summary judgment and dismissed both actions.

On petitioners' appeal, the Fourth Circuit, on July 9, 1987, entered a judgment and an opinion affirming the Eastern District's orders. No petition for rehearing was sought.

The jurisdiction of this Court to review the judgment of the Fourth Circuit is invoked under 28 U.S.C. Section 1254(1).

STATUTES AND REGULATIONS INVOLVED

29 U.S.C. Section 626(d)(1). (d) Filing of charge with Commission; timeliness; conciliation, conference and persuasion.

No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed -

(1) within 180 days after the alleged unlawful practice occurred.

29 U.S.C. Section 626(e)(1). (e) Statute of limitations; reliance in future on administrative ruling, etc.; tolling.

(1) Sections 255 and 259 of this title shall apply to actions under this chapter.

29 U.S.C. Section 255(a) (The Portal-to-Portal Act statute of limitations).

(T)he cause of action...may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued.

29 U.S. C. Section 627. Notices to be posted.

Every employer, employment agency, and labor organization shall post and keep posted in conspicuous places upon its premises a notice to be prepared or approved by the Equal Employment Opportunity Commission setting forth information as the Commission deems appropriate to effectuate the purposes of the chapter.

29 C.F.R. Section 1627.10. Notices to be posted.

Every employer...which has an obligation under the Age Discrimination in Employment Act of 1967 shall post and keep posted in conspicuous places upon its premises the notice pertaining to the applicability of the Act prescribed by the Commission or its authorized representative. Such a notice must be posted in prominent and accessible places where it can readily be observed by employees, applicants for employment and union members.

IN THE SUPREME COURT
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October Term, 1987

HAROLD A. MORSE, Petitioner

v.

THE DAILY PRESS, INC., Respondent

RICHMOND SULLIVAN, Petitioner

v.

THE DAILY PRESS, INC., Respondent

The petitioners, Harold A. Morse and Richmond Sullivan respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in the above proceedings on July 9, 1987.

STATEMENT OF THE CASE

Petitioner, Harold A. Morse, was an employee of The Daily Press, Inc., for thirteen years before his discharge on September 30, 1982, when he was 61 years old. He was told by the respondent, his employer, that he was being terminated because the company was consolidating its staff and that, consequently, there was a reduction in force, which reduction included Mr. Morse. He accepted those reasons at the time. Mr. Morse had no suspicions that there might have been any age discrimination until, in late 1983, he learned that The Daily Press, Inc., had discharged a number of older employees and replaced them with younger employees. This led him to promptly file a complaint along with Richmond Sullivan. Mr. Morse was

named as a co-complainant on Mr. Sullivan's complaint filed with the EEOC on December 27, 1983. Mr. Morse received notice from the EEOC on December 18, 1984 that it had no plan to continue any conciliation efforts. He then filed the present suit on July 1, 1985.

Petitioner Richmond Sullivan was also an employee of The Daily Press, Inc. He was discharged after six years of employment, on June 6, 1982, at the age of 42. He understood that he was discharged for cause, but he did not question the employer at that time.

Mr. Sullivan filed for unemployment compensation benefits within a week of his discharge. When he learned that his former employer was contesting his unemployment benefits claim, he consulted an attorney in September of

1982. At the unemployment benefits hearing, he was accused of specific acts of misconduct, but the hearing officer ruled that there was insufficient evidence of cause to dismiss, i.e., sufficient to deny him unemployment benefits, partly because the employer's representatives had to admit that they had not informed him of some of the acts that they were alleging led to his dismissal.

In October of 1982, Mr. Sullivan consulted another attorney for the sole purpose of securing advice as to his right to institute a libel action against his former employer for what its representatives said about him at the unemployment compensation hearing.

Not until the following year did he begin to suspect that he might have been discharged because of his age. He saw a

newspaper article about an age discrimination case against The Daily Press, Inc., and spoke with some of his former acquaintances at the newspaper. He learned that many older employees had been discharged and that younger employees had been retained or hired to replace them. Mr. Sullivan promptly filed a charge with the EEOC on December 27, 1983, as noted above. He received the same notice from the EEOC on December 18, 1984, as Mr. Morse and filed this present action on July 1, 1985.

An initial Motion to Dismiss by the respondent on the basis that Mr. Morse had failed to timely file a charge with the EEOC sixty days before he filed his civil action was denied on the basis that the filing of a charge by Mr. Sullivan with Mr. Morse listed as a co-

complainant satisfied this filing requirement. In the same order, entered on September 16, 1985, the Eastern District Court denied the motion as to the two other time requirements of the ADEA, specifically, filing a charge with the EEOC within 180 days pursuant to 29 U.S.C. Section 626(d)(1) and filing a separate civil action pursuant to 29 U.S.C. Section 626(e)(1), as being premature since they were subject to equitable modification, and thus an evidentiary hearing might be necessary.

In a Memorandum Order dated and entered on July 17, 1986, the Eastern District Court granted the respondent's Motion for Summary Judgment on the following bases:

1) The Court found no genuine issue of material fact concerning equitable tolling, by finding that the posting of

a notice in an interior office of the employer's personnel department was a posting in a conspicuous place; and that 29 U.S.C. Section 627 did not require a posting in more than one place.

2) The Court rejected Morse's equitable estoppel argument based on the reasons given to him at the time of his discharge by the employer as a misrepresentation of the facts, because it noted that "nearly every discrimination case is occasioned by an employer defending his action with a nondiscriminatory justification." p. a infra.

3) The Court held that Sullivan's simply retaining an attorney, regardless of the reasons, was sufficient to bar any equitable relief; and

4) that 29 U.S.C. Section 626(e)(1)

bars any action filed beyond the two-year limitation unless there was a willful violation, and both plaintiffs had filed beyond that period.

On appeal, the Fourth Circuit affirmed in holding:

1) that 29 U.S.C. Section 627 and 29 C.F.R. Section 1627.10 did not require multiple notices;

2) that a notice was continuously displayed in an office in the personnel department, which the Court found to be a conspicuous place;

3) that there was no evidence of duplicity on the part of the employer;

4) that Sullivan's retention of an attorney shortly after his discharge to represent him on his unemployment claim extinguished any equitable reasons for tolling the time period of 29 U.S.C. Section 626(d)(1); and

5) that there was no genuine issue of material fact on the claim of willful discrimination and, consequently, both actions were untimely filed.

Both lower courts rejected out-of-hand the petitioners' claim for equitable estoppel based on the employer's conduct as to the stated reasons for their discharges, and appear to have totally ignored Sullivan's claims as to the charges made against him at the unemployment compensation hearing after his discharge.

On the notice issue, neither court referred to the admitted fact that the notice was posted in an interior office of the personnel department, i.e, in the office of the secretary to the Personnel Director; nor that there was a reasonable inference, based on the employer's evidence, that only employees

who intended to see the Personnel Director usually passed through his secretary's office.

Neither court made any reference to whether or not the time limitation of 29 U.S.C. Section 626(e)(1) was subject to equitable modification, probably because neither court found any reasons for equitable tolling or equitable estoppel.[1]

[1]It should be noted that the Fourth Circuit has held that "it is clear that the statute of limitations of 29 U.S.C. Section 255 (incorporated under Section 626(e)) may be equitably modified where circumstances warrant." (Cite omitted.) Vance v. Whirlpool Corp., 707 F.2d 483 (4th Cir. 1983), cert. denied, 465 U.S. 1102, 104 S.Ct. 1600, 80 L.Ed.2d 130 cert. denied, 467 U.S. 1226, 104 S.Ct. 2678, 81 L.Ed.2d 873 (1984).

REASONS FOR GRANTING THE WRIT

I. WHETHER CONSIDERATION OF ISSUES OF EQUITABLE TOLLING AND EQUITABLE ESTOPPEL, WHICH COULD MODIFY THE TIME LIMITATIONS IN THE AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA), MAY BE PROPERLY DISPOSED OF BY A SUMMARY JUDGMENT WITHOUT A FULL EVIDENTIARY HEARING, AND AS TO WHICH THERE IS CONFLICT AMONG THE COURTS OF APPEALS.

The Fourth Circuit's summary disposition of petitioners' equitable tolling and equitable estoppel claims without a full evidentiary hearing has deprived them, and all others similarly situated, of the protections of the ADEA.

Such a disposition prevents a full review of the issues of equitable modification and cuts off all chance of reviewing the merits of the employees' claims.

In the Tenth Circuit, in a factually similar case involving allegations that the act of the employer

concerning the reasons advanced for the employee's discharge was misleading, the Court of Appeals held that where an employee was first told that her position was being eliminated but later learned that her job was not only not abolished but that a younger person of the opposite sex had filled it, an evidentiary hearing was necessary and that summary judgment was inappropriate. Wilkerson v. Siegfried Ins. Agency, Inc., 621 F.2d 1042, 1045 (10th Cir. 1980).

As to why such a hearing is necessary, that Court noted the following: "Whether a case warrants a finding of equitable tolling or estoppel almost invariably involves the credibility of the various witnesses. Credibility is difficult to determine from affidavits, or depositions." Id.

See also Hrzenak v. White-Westinghouse Appliance Co., 682 F.2d 714, 718 (8th Cir. 1982) (Full evidentiary hearing held where employee did not contest that the notice was prominently posted but only that he had not seen it - a position which has universally failed to establish tolling.) Aronsen v. Crown Zellerbach, 662 F.2d 584, 595 (9th Cir. 1981), cert. denied, 459 U.S. 1200, 103 S.Ct. 1183, 75 L.Ed. 2d 431 (1983) (Followed Wilkerson.) But see Dillman v. Combustion Engineering, Inc., 784 F.2d 57 (2nd Cir. 1986) (Distinguishable because the record indicated that employee was aware of his rights at an early point within the required time periods.)

The Fourth Circuit, as did the District Court before it, failed to address Morse's equitable tolling

argument based on the fact that the reasons he was given by the employer for his discharge were misleading and he did not learn any facts that put him on alert as to the possibility of discrimination until long after the time periods had expired. In such circumstances other courts would apply equitable modification to statutes of limitation. "(T)he statute does not begin to run until the facts which would support a cause of action are apparent or should be apparent to a person with a reasonably prudent regard for his rights." Reeb v. Economic Opportunity Atlanta, Inc., 516 F.2d 924, 930 (5th Cir. 1975). See also Cocke v. Merrill Lynch & Co., Inc., 817 F.2d 1559, 1561 (11th Cir. 1987); Tucker v. United Parcel Service, 756 F.2d. 724, 726 (th Cir. 1981); Pirone v. Home Ins. Co., 507

F.Supp. 1281, 1289 (S.D.N.Y. 1981), aff'd, 742 F.2d 1430 (2nd Cir. 1983).

Although it is admittedly difficult to establish a bright line in such cases as age discrimination, there is no reason to deprive an employee of a full evidentiary hearing if he raises issues of equitable tolling and equitable estoppel as to his failure to be aware of the discriminatory nature of his employer's act within the requisite time periods, especially when there is no evidence that he knew or should have known that the act was discriminatory. This is nothing more than a recognition of the judicial doctrine of fundamental fairness.

For this reason, the position of Wilkerson and Aronsen should be followed nationally. Furthermore, the Fourth Circuit's conclusion that the posting of

the notice was in a conspicuous place is plain error. 29 U.S.C. Section 627 and 29 C.F.R. Section 1627.10 require that any notice be posted in "conspicuous places." It must give the employees, not just the applicants for employment, "a meaningful opportunity of becoming aware of their ADEA rights so that one may reasonably conclude that the employees either knew or they should have known of their statutory rights." Charlier v. S.C. Johnson & Son, Inc., 556 F.2d 761, 764, reh. denied, 559 F.2d 1217 (5th Cir. 1977). See Kephart v. Institute of Gas Technology, 581 F.2d 1287, 1289 (7th Cir. 1978). Many courts have held that failure to post such notice tolls the 29 U.S.C. Section 626(d)(1) period until the employee acquires actual knowledge of his statutory rights or seeks an attorney,

discussed, infra at 21-25. See e.g., Posey v. Skyline Corp., 702 F.2d 102, 105 (7th Cir.), cert. denied, 464 U.S. 960, 104 S.Ct. 392, 78 L.Ed.2d 336 (1983). On considering the issue of adequate posting to meet the statutory requirements, the First Circuit Court of Appeals has established the following list of questions to be considered:

> In addressing an equitable claim based upon an asserted failure to post...a court must consider a potentially endless combination of questions. Did the employer post notices anywhere? If so, were they posted conspicuously? In one building but not another? On every floor? If not, did the employee have actual or constructive knowledge of his rights?

Earnhardt v. Com. of Puerto Rico, 691 F.2d 69, 73 (1st Cir. 1982). It should be noted that in that case, the Court vacated the summary judgment and remanded the case to the District Court

for an evidentiary hearing on this issue. Id. See also Bonham v. Dresser Industries, Inc., 569 F.2d 187 (3rd Cir. 1977), cert. denied, 439 U.S. 821, 99 S.Ct. 87, 58 L.Ed.2d 113 (1978).

In the present case, the employer's evidence which established conclusively that the notice, whether it contained any information about the ADEA at all,[2] was in an inner office of the Personnel Department, situated between an outer office, where applicants for employment filled out the necessary forms, and the Personnel Director's office. In her deposition, the Personnel Director's secretary who had occupied the office in

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[2] The poster displayed at the time of the petitioners' discharges had been destroyed, and the secretary who occupied the office in which it was displayed could not remember if it referred to ADEA rights.

which the posters regarding discrimination rights have been displayed, admitted that employees read the posters "when they are waiting to get in to talk to the Personnel Director. Probably just for something to do." App. at 97.[3] A reasonable inference from this evidence is that access to this inner office by employees as opposed to applicants is predicated on the need to see the Personnel Director. In a motion for summary judgment, the moving party has "the burden of showing the absence of a genuine issue as to any material fact, and for these purposes the material it lodged must be viewed in the light most favorable to the opposing party."

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[3] Refers to the Joint Appendix prepared by the parties for the appeal to the Fourth Circuit.

Adickes v. Kress & Co., 398 U.S. 144, 157, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). Here, the Fourth Circuit ignored the reasonable inferences and, in fact, did not even note where the office was exactly located in deciding that it satisfied the statutory requirements. This is plain error. At the least, the petitioners should be permitted to present evidence at a hearing that this was not a conspicuous place, through the testimony of current and former employees familiar with the employer's operations.

II. WHETHER AN EMPLOYEE SHOULD BE BARRED FROM ANY EQUITABLE MODIFICATION OF THE ADEA TIMING REQUIREMENTS BECAUSE HE HAS CONSULTED AN ATTORNEY DURING THE PERTINENT PERIODS FOR REASONS UNRELATED TO ANY AGE DISCRIMINATION CLAIM, AND AS TO WHICH THERE IS CONFLICT AMONG THE COURTS OF APPEALS.

On the issue of the consultation of an attorney during the pertinent ADEA time periods for any reason, as an absolute bar to equitable modification presumably on the theory that such consultation imputes constructive knowledge to the client as to his statutory rights under the ADEA, there is a split of authority among the Circuit Courts. Most Circuit Courts in ADEA cases do not apply such a blanket application of the rule of constructive knowledge in cases where discrimination is not suspected by the employee at the time of the consultation.[4] "Rather, they

[4] It should be noted that there is some support for the Fourth Circuit's position among the District Courts.

for the most part stand for the laudable notion that a plaintiff who has consulted with an attorney about a potential discrimination claim will not get away with complaining that he failed to understand the requirements and implications of the statute." Meyer v. Riegel Products, 720 F.2d 303, 308 (3rd Cir. 1983), cert dismissed, 465 U.S. 1091, 104 S.Ct. 2144, 79 L.Ed.2d 910 (1984). See also Keyse v. California Texas Oil Corp., 590 F.2d 45 (2nd Cir. 1978); Smith v. American President Lines, Ltd., 571 F.2d 102 (2nd Cir. 1978); compare Dartt v. Shell Oil Co., 539 F.2d 1256 (10th Cir. 1976), aff'd by an equally divided Court, 434 U.S. 99, 98 S.Ct. 600, 54 L.Ed.2d 270 (1977) reh. denied, 434 U.S. 1042, 98 S.Ct. 600, 54 L.Ed.2d 792 (1978) (Employee actually "twice promptly sought private legal

advice and twice promptly followed that advice," id. at 1261, and still was not barred by her first contact with an attorney during the pertinent time period because the contact was quite brief and she followed his advice and filed a complaint with the Department of Labor); but see Edwards v. Kaiser Aluminum & Chemical Sales, Inc., 515 F.2d 1195 (5th Cir. 1975) (Employee contacted attorney about his "legal rights" upon discharge and attorney failed to advise him of his statutory rights under the ADEA.)

In a case where the reasons given by the employer for the employee's discharge were misleading, even when he requested clarification so that he and his lawyer doubted that he had a valid age discrimination claim, the Court refused to bar equitable relief,

reversed the summary judgment and remanded the case for trial. Meyer v. Riegel Products, 720 F.2d at 309. That Court described the employee's position as follows:

> Where a defendant misleads a plaintiff he may also mislead plaintiff's lawyer, and in such a case the alleged fraud supersedes the results that ordinarily flow from consultation with an attorney. Such an interpretation of the case law seems to be precisely what we had in mind in Bonham, in which plaintiff had secured counsel, when we nevertheless remarked that "cases may arise where the employer's own acts or omissions have lulled the plaintiff into foregoing prompt attempt to vindicate his rights."

Id. In such cases, the absolute bar rule would favor employers who have engaged in misleading conduct and relieve them of any legal consequences of such conduct. It would also penalize employees who failed to retain attorneys who are experienced in the area of age

discrimination law.

Furthermore, application of this rule has a negative impact on the attorneys consulted for nondiscrimination-related reasons, possibly leaving them vulnerable to legal malpractice claims or the loss of clients. To avoid such consequences, they would have to screen all clients between the ages of forty and seventy for potential age discrimination cases.

For all of these reasons, the absolute bar rule applied by the Fourth Circuit court of Appeals should be abolished, and each case should be considered on its facts with the requisite balancing of the equities.

CONCLUSION

For all of the above reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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October 7, 1987

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-2125(L)

Harold A. Morse,

Plaintiff - Appellant,

versus

The Daily Press, Inc., a Corporation of the Commonwealth of Virginia,

Defendant - Appellee.

No. 86-2126

Richmond Sullivan,

Plaintiff - Appellant,

versus

The Daily Press, Inc., a Corporation of the Commonwealth of Virginia,

Defendant - Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Newport News. John A. MacKenzie, Senior District Judge. (CA-85-000-N).(85-0101-N)

Argued: April 7, 1987 Decided: July 9, 1987

Before WIDENER, and CHAPMAN, Circuit Judges, and HAYNSWORTH, Senior Circuit Judge.

Frederick Edward Popovitch (Popovitch & Popovitch; Bernard J. DiMuro; Hirschkop & Associates, P.C. on brief) for Appellants; Robert B. Delano, Jr. (Henry M. Massie, Jr.; Sands, Anderson, Marks & Miller; Gregory P. Schermer; Hanson, O'Brien, Birney & Butler on brief) for Appellee.

PER CURIAM:

Appellants Richmond Sullivan and Harold A. Morse brought these suits against the Daily Press, Inc. pursuant to the provisions of the Age Discrimination in Employment Act (ADEA), 29 U.S.C.A. Sections 621 through 634 (1985 and Supp. 1987). Summary judgment was granted in favor of the employer because neither appellant complied with the ADEA's time limitations, and, despite appellants' contention that the required notice of rights was inadequately posted, there were no grounds to toll the ADEA's time limitations under either the theory of equitable tolling or the theory of equitable estoppel. We find that the district court properly granted summary judgment and affirm.

I

A charge with the Equal Employment Opportunity Commission (EEOC) must be filed

within 180 days after the alleged unlawful practice occurred. An individual may not commence a civil action under the ADEA until sixty days after a charge alleging unlawful discrimination has been filed with the EEOC. 29 U.S.C. Section 626(d) (1985). An individual's right to bring a private civil action terminates if the EEOC begins an action to enforce the rights of the individual. 29 U.S.C.A. Section 626(c)(1) (1985).

Sullivan and Morse filed their charge with the EEOC on December 27, 1983, more than a year and a half beyond Sullivan's discharge on June 7, 1982 and nearly a year and three months beyond Morse's discharge on September 30, 1982. Both appellants contend their firing was based on age discrimination, yet present no reason why they would not have been aware of this alleged discrimination on the date of thier discharge. Clearly, each

cause of action accrued on the date of appellant's discharge. Both charges were filed well beyond the 180-day period for filing claims with EEOC. Despite the fact that they have failed to comply with the filing requirements of the ADEA, appellants contend that their civil action should be allowed under either the doctrine of equitable tolling or the doctrine of equitable estoppel.

Equitable tolling and equitable estoppel are separate methods of modifying the ADEA's 180-day limitation period. Equitable tolling focuses on the claimant's excusable ignorance of the employer's discriminatory act. Equitable estoppel, in contrast, examines the employer's conduct and the extent to which the claimant has been induced to refrain from exercising his rights. Felty v. Graves-Humphreys Co., 785 F.2d 516, 519 (4th Cir. 1986).

Appellants base their equitable tolling argument upon allegations that The Daily Press failed to satisfy its statutory obligation to post in conspicuous places notice of employees' rights under the ADEA as required by 29 U.S.C.A. Section 627 (1985). Appellants contend that, because both the statute and the implementing regulation require that the notice be posted in "conspicuous places" more than one notice is required. See 29 U.S.C.A. Section 627 (1985); 29 C.F.R. Section 1627.10. This argument in semantics is not persuasive. The statute and the regulations similarly refer to "a notice". 29 U.S.C. Section 627 and 29 C.F.R. Section 1627.10. The purpose of the statute is not that notice be posted in every individual office or work room, or on every available bulletin board. Notice is sufficient if it is posted conspicuously so that employees have a meaningful opportunity

for becoming aware of their ADEA rights. A single posting of notice is sufficient to satisfy 29 U.S.C. Section 627, if that posting is in a centrally located area where employees are likely to see it. See Bomberger v. Consolidated Coal Company, 623 F. Supp. 89, 92 (W.D.Pa. 1985); Keitz v. Lever Brothers Company, 563 F. Supp. 230, 235 (N.D.Ind. 1983).

It is undisputed that a notice of rights has been continuously displayed in the personnel office of The Daily Press from 1974 to the present. The office is open to the general public. The evidence indicates that applicants for employment and employees routinely stop and read the notice. No other documents were placed on the wall in question, and there is an unobstructed view of the notice. The district court correctly held that this notice is conspicuous as required by 29 U.S.C.A. Section 627.

Appellants contentions that equitable estoppel should be applied to the 180-day limitation because of acts by The Daily Press which allegedly induced them to refrain from exercising their rights are equally without merit. Appellants have simply presented no evidence showing duplicity on the part of The Daily Press. Appellant Sullivan retained an attorney shortly after his discharge to represent him on his employment uncompensation claim. In October 1982 he contacted another attorney to discuss his discharge. Retaining an attorney extinguishes the equitable reasons for tolling the 180-day period. Edwards v. Kaiser Aluminum, 515 F.2d 1195 (5th Cir. 1975).

II

Under the ADEA, a private action may only be commenced within two years after the date upon which the cause of action

accrues, unless there is a showing that such cause of action arose out of a willful violation of the act, then such action may be commenced within three years after the cause of action accrues. 29 U.S.C. Section 626(e)(1) (1985) (incorporating 29 U.S.C. Section 255 (1985)). Both Sullivan and Morse filed thier actions on July 1, 1985. As previously mentioned, the causes of action accrued on the date of each appellant's discharge; therefore, Sullivan filed his claim over three years after his alleged cause of action accrued, and Morse filed his claim over two and a half years after his alleged cause of action accrued. Appellants have created no genuine issue of material fact on their claim of willfully discrimination; therefore, each claim is barred by the statute of limitations. 29 U.S.C. Section 626(e)(1).

The decision of the district court is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Newport News Division

RICHMOND SULLIVAN, Plaintiff	]	
v.	]	CIVIL ACTION NO. 85-101-NN
THE DAILY PRESS, INC., Defendant	]	
HAROLD A. MORSE, Plaintiff	]	
v.	]	CIVIL ACTION NO. 85-100-NN
THE DAILY PRESS, INC., Defendant	]	

MEMORANDUM ORDER

On September 16, 1985, the Court denied the defendant's motion to dismiss Morse's complaint for allegedly failing to file an EEOC charge. The Court held in abeyance the defendant's motions to dismiss both Morse and Sullivan for noncompliance with ADEA's time limitations and granted the

plaintiffs leave to amend their complaints to allege equitable tolling and willful violations of ADEA. The plaintiffs amended their complaints and the defendant renews and enlarges its motions for summary judgment. For the reasons set forth below, the Court GRANTS the defendant's motions and DISMISSES both actions.

In analyzing a summary judgment motion, the Court views all factual inferences in favor of the nonmoving party and may grant the motion only if the evidence fails to present a genuine issue of material fact. To establish a "genuine" issue for trial, however, the plaintiffs "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Electric Industrial Co. v. Zenith Radio Corp., 54 U.S.L.W. 4319, 4322 (U.S. March 26, 1986). In the present case, the Court finds that no genuine factual

dispute exists and that the defendant is entitled to judgment because the plaintiffs failed to comply with ADEA's time limitations.

ADEA's 180-Day Requirement

ADEA requires that an aggrieved employee file an EEOC charge within "180 days after the alleged unlawful practice occurred . . . ." 29 U.S.C. § 626(d)(1). Sullivan and Morse filed their charge on December 27, 1983, more than a year and a half beyond Sullivan's discharge on June 7, 1982 and nearly a year and three months beyond Morse's discharge on September 30, 1982. Both charges, therefore, were well beyond the 180-day period.

The plaintiffs seek to escape summary judgment by asserting that the defendant allegedly failed to post a conspicuous ADEA notice and thereby equitably tolled the 180-day period. In addition, Morse

asserts that the defendant "actively misled" him by stating that his discharge resulted from a reduction-in-force policy. This alleged misrepresentation, Morse contends, equitable estopped the defendant from raising this issue. The defendant, however, argues that neither ground has any factual support and that summary judgment should enter.

Equitable tolling and equitable estoppel are separate methods of modifying ADEA's 180-day requirement. Equitable tolling focuses on the plaintiff's excusable ignorance of the employer's discriminatory act. Equitable estoppel, in contrast, examines the defendant's conduct and the extent to which the plaintiff has been induced to refrain from exercising his rights. Felty v. Graves-Humphreys Co., _____F.2d _____, slip op. at 8 (4th Cir. March 7, 1986). In the present case, neither method applies to modify the 180-day period.

First, the plaintiffs fail to raise a genuine issue of material fact concerning equitable tolling. The deposition and affidavit testimony of Donald Blankenship, the defendant's personnel director, and Joanne Keating, the personnel secretary, demonstrates that a notice of rights has been continually displayed in a conspicuous place in the personnel office from 1974 to the present. They further testify that (1) the office is open to the general public; (2) applicants and employees routinely stop and read the notice; (3) no other documents were placed on the wall; and (4) the public has an entirely unobstructed view of the notice. The defendant also submits two photographs that depict the present notice in a conspicuous place in Keating's office in the same manner as it has existed since 1974, and as it existed in 1982.

In response, the plaintiffs submit affidavits which state that they never actually viewed the notice; yet, significantly, none of the affidavits contend that the defendant did not post the notice as suggested by Blankenship and Keating. This response does not attempt to refute the defendant's position and, therefore, falls far short of presenting an issue of fact concerning the posting of the notice in the personnel office. Vaught v. R. R. Donnelley & Sons Co., 745 F.2d 407 (7th Cir. 1984); Posey v. Skyline Corp. 702 F.2d 102 (7th Cir.), cert. denied, 464 U.S. 960 (1983).

The plaintiffs also argue that ADEA requires multiple notices and that the failure to post more than one notice tolls the 180-day period. No relevant case law has stretched the logic of equitable tolling to this extent, and the Court notes that

the leading case in the circuit, Vance v. Whirlpool Corp., 716 F.2d 1010 (4th Cir. 1983), repeatedly refers to the requirement of posting "a notice". See also Keitz v. Lever Brothers Co., 563 F.Supp. 230 (N.D. Ind. 1983); Butz v. Hertz Corp., 554 F.Supp. 1178 (W.D. Pa. 1983); Hay v. Wells Cargo, Inc., 596 F.Supp. 635 (D. Nev. 1984). The Court, therefore, rejects this assertion as an implausibly rigid extension of the doctrine of equitable tolling.

Second, equitable estoppel results if "an employer engages in activety that it knows or reasonably should know will cause an employee to delay the filing of a discrimination complaint . . . ." Felty, _____F.2d ____, slip op. at 10. To implicate equitable estoppel, the defendant typically must engage in some sort of fraud, e.g., promising to rehire the employee, yet actually trying

to delay a discrimination charge, Franci v. Avco Corp., Avco Lycoming Division, 538 F. Supp. 250 (D. Conn. 1982).

Morse asserts that the defendant "misrepresented" the nature of his discharge by advising him that a reduction-in-force policy justified the defendant's actions. The Court must reject this contention because nearly every discrimination case is occasioned by an employer defending his action with a nondiscriminatory justification. By itself, this conduct cannot rise to a level of wrongdoing sufficient to free the employee of complying with the statutory filing requirements. Moreover, in Felty, the United States Court of Appeals for the Fourth Circuit analyzed an analogous fact pattern and made no mention that merely informing the employee "that there would be reductions in the work force" would itself implicate equitable estoppel. The

Court, therefore, finds no merit in Morse's position.

Even if equitable considerations toll the 180-day period, this tolling expires when the employee either obtains "actual knowledge of his rights or retains an attorney." Vance, 716 F.2d at 1013 (emphasis added). In Sullivan's case, it is uncontested that he retained attorney Allen Maust to represent him before the Virginia Employment Commission within three months of his discharge. In addition, Sullivan contacted another attorney in October of 1982 to discuss the facts surrounding the discharge.

Sullivan claims that he discussed only unemployment compensation and libel issues with his attorneys and that neither attorney advised him of his ADEA rights. The weight of authority, however, holds that simply retaining an attorney extinguishes the

the equitable reasons for tolling the 180-day period. See Edwards v. Kaiser Aluminum and Chemical Sales, Inc., 515 F.2d 1195 (5th Cir. 1975) ("we are unwilling to charge against the employer the inaction of appellant's attorneys"); Downie v. Electric Boat Division, 504 F.Supp. 1082 (D. Conn. 1980; see also Saunders v. Duke University, 538 F.Supp. 1143, 1146 n.2 (M.D.N.C. 1982). Indeed, the force of Sullivan's argument would render superfluous the "or retains an attorney" language of Vance. If the attorney must advise the plaintiff of his ADEA rights, then the tolling expiration would merely be when the employee obtains "actual knowledge of his rights", albeit in some cases from his attorney. Accordingly, the Court rejects this view and holds that Sullivan's retention of Maust would extinguish any tolling which would otherwise be available.

ADEA's Statute of Limitations

ADEA's statute of limitations bars actions filed beyond two years, except for cases alleging a willful violation for which the limitation extends to three years. See 29 U.S.C. § 626(e)(1) (incorporating Portal-to-Portal Act, 29 U.S.C. § 255(a)). Although the Court's earlier order held in abeyance the defendant's motion to dismiss on limitation grounds, it raised 29 U.S.C. § 626(e) (2) as an applicable provision to toll the repose while the "Commission is attempting to effect voluntary compliance with requirements of this chapter through informal methods of conciliation . . ."

The defendant asserts that tolling for administrative conciliation efforts occurs only in cases prosecuted by the EEOC, not in cases brought by private plaintiffs such as Sullivan and Morse. Several courts have followed this view, and upon reconsider-

ation, the Court holds administrative tolling inapplicable to private suits. See Leite v. Kennecott Copper Corp., 558 F.Supp. 1170 (D.C. Mass.), aff'd 720 F.2d 658 (1st Cir. 1983); Hovey v. Lutheran Medical Center, 516 F.Supp. 554 (E.D.N.Y. 1981). Because Sullivan brought this action beyond the maximum three year limitations, the Court dismisses his suit pursuant to 29 U.S.C. § 626(e)(1). Because Morse filed his action beyond two years yet before three years, the Court dismisses his non-willful ADEA claims.

In sum, ADEA requires an employee (1) to file an EEOC charge within 180 days of the discharge, and (2) to file a lawsuit within two years of a non-willful violation and within three years of a willful violation. Neither Sullivan nor Morse complied with the 180-day requirement or the two year statute of limitations. In addition, Morse

failed to satisfy the three year limitation on claims of willful ADEA violations. Accordingly, the Court GRANTS the defendant's motions for summary judgment and DISMISES both actions.

It is so ORDERED.

/s/ John A. Mackenzie
United States District Judge

Norfolk, Virginia
September 13, 1985.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Newport News Division

HAROLD A. MORSE, Plaintiff	]	
v.	]	
THE DAILY PRESS, INC., Defendant	]	CIVIL ACTION NO. 85-100-NN

RICHMOND SULLIVAN, Plaintiff	]	
v.	]	
THE DAILY PRESS, INC., Defendant	]	CIVIL ACTION NO. 85-101-NN

ORDER

On July 1, 1985, Morse and Sullivan filed separate suits against their former employer, The Daily Press, Inc., for violations of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634. Because both actions raise common questions of

law and fact, we CONSOLIDATE the suits into one action to avoid unnecessary costs or delay. See Fed. R. Civ. P. 42(a).

The Daily Press discharged Sullivan on June 7, 1982 and Morse on September 30, 1982. On December 27, 1983, Sullivan filed a charge with the Equal Employment Opportunity Commission (EEOC) alleging violations of ADEA. On a third-party certification of charge form supplied to Sullivan by the EEOC, Sullivan listed Morse as an additional aggrieved person. The EEOC did not act upon the charges until December 18, 1984, when it determined that the ADEA violation was not substantiated.

Sullivan and Morse filed suit on July 1, 1985. The Daily Press moves to dismiss Sullivan's claim on the grounds that ADEA's statute of limitations provision governing non-willful violations bars the action. The Daily Press moves to dismiss Morse's

claim because, allegedly, Morse failed to file an EEOC charge as required by ADEA. The Daily Press also moves to dismiss both complaints for failure to comply with ADEA's procedural requirement that the EEOC charge be filed within 180 days of the alleged unlawful practice. Plaintiffs move this Court to grant leave to amend their complaints to show equitable considerations excusing their noncompliance.

First, ADEA contains a provision that no civil action may be commenced alleging violations of the act until 60 days after an EEOC charge has been filed. The defendant claims that since Morse failed to file an EEOC charge he is thus precluded from bringing suit. We disagree. Sullivan's primary charge with the EEOC stated that the Daily Press systematically discharged him and other members of a class. The EEOC form used by Sullivan for his claim,

entitled "Third Party Certificate of Charge," also names Morse as a complainant and gives his address. On the form, Sullivan certifies that the "individual named herein [Morse] is aware of the charge and that it has been lodged in [his] behalf as a person claiming to be aggrieved."

The Code of Federal Regulations defines a charge as a "statement filed with the Commission by or on behalf of an aggrieved person . . . ." 20 C.F.R. § 1626.3 (emphasis added). The Code further states that the procedural regulations "shall be liberally construed to effectuate the purposes and provisions of [ADEA] . . . ." 20 C.F.R. § 1626.19. In light of the EEOC regulations, we hold that Morse satisfied the requirement of filing a charge at least 60 days before filing suit. The Daily Press's motion to dismiss Morse's claim on grounds that no charge had been filed is DENIED.

Second, ADEA incorporates by reference the statute of limitations found in the Portal-to-Portal Act, 29 U.S.C. § 255. The statute bars suits brought more than two years after the accrual of the cause of action based on a non-willful ADEA violation. For causes of action based on willful violations, the statute provides a three year statute of limitations.

The defendant moves to dismiss Sullivan's claim because more than three years have elapsed between Sullivan's dismissal on June 6, 1982 and his filing of this suit on July 1, 1985. However, a tolling provision of 29 U.S.C. § 626(e)(2) states, "For the period during which the Secretary is attempting to effect voluntary compliance with the requirements of this Act through informal methods of conciliation . . . the statute of limitations as provided in section 6 of the Portal-to-Portal Act

of 1947 shall be tolled . . . ." Sullivan filed his EEOC charge on December 27, 1983. The EEOC processed the charge and on December 18, 1984 it determined that the ADEA violation was not substantiated. The tolled period under 29 U.S.C. § 626(e)(2) is 11 months and 21 days. Such tolling reduces the total period to 2 years, 1 month, and 3 days. Sullivan's claim therefore survives the statute of limitations unless he can allege and prove willful violation of ADEA. Defendant's motion to dismiss on this account will be held in ABEYANCE pending the filing of an amended complaint and the subsequent action hereinafter set forth.

Third, The Daily Press moves to dismiss both Sullivan and Morse for failure to comply with ADEA's timely-charge requirement that states, "No civil action may be commenced by an individual under this section until 60 days after a charge . . . [s]uch

a charge shall be filed (1) within 180 days after the alleged unlawful practice occured . . . ." 29 U.S.C. § 626(d)(1). The EEOC charge was filed on December 27, 1983 which comes 1 year, 6 months, and 21 days after Sullivan's discharge and 1 year, 2 months, and 27 days after Morse's discharge. In other words, the charges were filed far more than 180 days after the alleged unlawful practice.

Plaintiffs claim, however, that equitable considerations may exist which may toll the 180 day period. We recognize that the 180 day provision of § 626(d) does not operate as a jurisdictional prerequisite to suit in federal court, and may be tolled or waived under exceptional circumstances. See Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1981); Green v. Whirlpool Corporation, 708 F.2d 128 (4th Cir. 1983). On the record as it now stands, however,

there is no evidence of such exceptional circumstances that would justify tolling for such a long period. Nevertheless, plaintiffs shall have thirty (30) days from this date to amend their complaint to allege facts implicating equitable tolling. We will hold in ABEYANCE the Daily Press's pending motion to dismiss on grounds that the plaintiffs have not satisfied the 180 day requirement. The motion can be renewed for action if and when the plaintiffs have filed an amended complaint. We foresee that an evidentiary hearing may be necessary to determine the propriety of equitable tolling.

In sum, we DENY defendant's motion to dismiss Morse for failure to file an EEOC charge, holding instead that Sullivan's third-party certification complied sufficiently with ADEA's requirements. We hold in ABEYANCE defendant's motion to dismiss

Sullivan on statute of limitations grounds pending the action hereinabove described. We hold in ABEYANCE defendant's motion to dismiss both Sullivan and Morse for failure to file their EEOC charge within the 180 day period pending action as hereinabove described. Plaintiffs' motions for leave to amend their complaint within thirty (30) days is GRANTED. The Court will reconsider the defendant's motions thereafter.

It is so ORDERED.

/s/ John A. Mackenzie
United States District Judge

Norfolk, Virginia
September 13, 1985.